

TESTIMONY

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Rulemakers Must Follow Rules, Too: Oversight of Agency Compliance with the
Congressional Review Act

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Mr. Chairman, ranking member, and members of the subcommittee, I appreciate the opportunity to testify today on the implications of the Congressional Review Act.

I am the Edward M. Robertson professor at the University of Maryland Francis King Carey School of Law and a founder and past president of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). CPR is a network of 61 scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary. We have a small professional staff funded by foundations. I joined academia mid-career, after working for the Federal Trade Commission for seven years, the House Energy and Commerce Committee for five years, and as a lawyer for municipal governments at Spiegel & McDiarmid, a local law firm. My work on health, safety, and environmental regulation includes five books and more than 30 articles (as author or co-author). I have served as consultant to the Environmental Protection Agency (EPA) and testified before Congress many times.

As you are aware, my fellow panelists are all fans of the Congressional Review Act (CRA), and I am cast in the role of the skunk at the picnic. I can only hope, though, that you will keep open minds as I pull the camera back a few hundred yards. I urge you to consider repealing the CRA because that option presents a golden opportunity for Congress to demonstrate a renewed commitment to its authority and responsibility for overseeing the regulatory state.

Wait just a minute, my fellow panelists are thinking, the woman has inappropriately appropriated our argument: the whole point of the CRA is for Congress to demonstrate its oversight chops. Didn't the House and Senate just finish choke-chaining the wanton over-regulation committed by the Obama administration? I agree that the 115th Congress demonstrated rapid decision-making by killing 14 rules in a period of just a few weeks. But that rapid-fire spate of activity attracted more negative publicity than regulatory issues have achieved

in many years. The story line of the coverage in most media outlets was that, at the behest of special interest lobbyists, especially those representing the profitable oil and gas and financial services sectors, Congress killed rules that seem to make a lot of sense. The impression left was that Congress is controlled by money, not rational, well-researched debate on the issues. That impression has an extraordinarily negative effect on our democracy. Nothing less than the stability of this great republic is at stake.

Judging from American history and the first-among-equals place the Framers assigned Congress in Article One of the Constitution, measures that enhance our great national legislature's ability to "make the laws" cannot be easily dismissed, especially at a time when the public frustration with Congress is disturbingly low. But as many knowledgeable commentators—most recently, Senator John McCain—have pointed out on a bipartisan basis, Congress was, has been, and will be great again only when it returns to the "regular order," a phrase connoting the use of all the tried and true mechanisms created over two centuries, from the drafting and introduction of bills, their referral to committees and subcommittees, debates within those small groups of expert members, negotiation, mark-up, reconciliation of the different bills reported out by all the committees with jurisdiction, more negotiation, debate on the floor, approval, referral to a conference committee, more negotiation, and enactment. Congressional gridlock, partisan polarization, shamefully short legislative work weeks, ceaseless fundraising, outlandishly expensive elections, and obeisance to business groups have driven many qualified legislators off the Hill and accomplished nothing less than the ruination of this noble institution's reputation.

According to Real Clear Politics, 14.3 percent of Americans approve of the Congress and 73.8 percent disapprove. To be sure, gridlock is a major, perhaps even the primary reason, for these numbers. But I don't think it follows from that observation that acting very quickly without deliberation at the behest—perceived or actual—of industry lobbyists is the miracle cure—or even a palliative—for the dysfunction that afflicts this noble body.

The CRA started life modestly, promoted as a mechanism for enhancing congressional oversight of the executive branch by providing, for a short window of action, expedited legislative procedures for disapproving recently finalized rules. As you know, this obscure piece of so-called "good government" law was invoked only once in the first 20 years of its existence, when the transition between Bill Clinton and George W. Bush resulted in passage of a resolution disapproving a rule designed to prevent ergonomic injury in the workplace. The Occupational Safety and Health Administration (OSHA), one of the most battered agencies in the government, has never returned—and may never again return—to this problem, which has become among the most debilitating and prevalent causes of job-related illnesses in industries from meat packing to elder care. The OSHA's interpretation of the CRA is based on fear, not law. The agency drastically over-reads the CRA's prohibition on the reissuance of the rule "in substantially the same form." Nevertheless, more than one journalist who has asked me to explain the CRA has referred to the provisions as "industry salting the earth," and that description is most unfortunately apt.

As we all know, of course, CRA resolutions targeting some three dozen rules came hurtling down the track as soon as the 115th Congress had convened and, by the time this enormous cloud of dust had settled, 14 rules were dead. (One more fell one vote shy of passing

in the Senate with at least a few of the “nays” citing the “salt the earth” provision as the basis for their vote.) The CRA precludes filibusters in the Senate and limits floor debate to ten hours to be equally divided between proponents and opponents of the resolution to disapprove. But because the majority party ceded back its five hours and floor time was much easier to schedule, it took an average of a mere 41 days from start to finish to terminate rules that had taken years to craft.

If agencies continue to over-read the law, the government’s response to a slew of problems that are quite important to average Americans will remain unaddressed. They include:

- Bribing foreign governments in the developing world to win drilling rights for offshore oil;
- Allowing severely disturbed people disabled by their mental illness to buy guns;
- Sheering the tops off mountains and dumping the debris in streams that serve as a drinking water source for numerous Appalachian communities;
- Giving employers with egregious labor violations unfetter access to government contracts;
- Depriving internet users of privacy online;
- Sanctioning the continued use of inhumane hunting practices for predators that inhabit public lands in Alaska.

Small wonder, then, that those wielding the hammers to kill the 14 rules were not interested in explaining at any length why these controls were such a bad idea, except in the generalized and misleading rhetoric about regulations that focuses solely on often exaggerated costs while ignoring the enormous benefits of our nation’s public protections.

When I worked for the Energy and Commerce Committee in the early to late 1980s, the indomitable John Dingell, the longest-serving member of Congress in history with 57 years of service, thought congressional oversight was so important that he spent a significant portion of the Committee’s budget on bipartisan supervision of departments and agencies. Whether or not the president was a Democrat, civil servants shuddered when so-called “Dingell-grams,” many drafted cooperatively with the minority, arrive at their doorstep. This issue-oriented, research and investigation-informed oversight had a more profound impact on policy than dozens of CRA resolutions and had the added advantage of avoiding hundreds of millions of dollars in wasted time for both government experts and interested stakeholders who spend years crafting rules slaughtered by the *faux* oversight provided by the CRA.

My fellow panelists will probably spend most of their time excoriating agencies for failing to file reports as required by the CRA. A small cottage industry has emerged under the leadership of Todd Gaziano extolling the possibility that Congress could claw back rules and guidance documents that have been in effect for years by retroactively disapproving them. The business community has greeted these suggestions with a deafening silence. A few explanations for this apathy seem possible. First, although companies may appreciate the opportunity to wipe rules off the books before they have started to comply with such requirements, those same dynamics do not apply to rules and guidance that everyone has learned to live with because they have been on the books for years. Second, beyond claiming that he has been fielding phone calls from “hundreds of lawyers” excited about his suggestion that agencies abandon all enforcement actions under these “hundreds if not thousands” of improperly promulgated rules and guidance

documents, Mr. Gaziano has very few examples to offer of rules that were not sent to Congress and yet were important enough to trigger enforcement actions. Third, a major focus of his ire is guidance issued by agencies without following the rulemaking process. Of course, this absence of process means that agencies are free to change such guidance at any time making further litigation in a friendly administration unnecessary. Last but by no means least, Congress has other far more important initiatives on its plate, from funding the government to disaster relief.

As for the charge that agencies have not been complying with their responsibilities under the CRA – in particular the requirement that they submit covered rules and guidance to the Government Accountability Office (GAO) and the House and Senate before those rules and guidance can become effective, the best research on this question confirms that non-compliance by agencies with this requirement has not been systemic or widespread. To the contrary, agency lapses are inadvertent and few.

Curtis Copeland is a nationally renowned regulatory expert who worked for many years for the Congressional Research Service, producing dozens of astute, well-written, and exceptionally useful reports on the issues arising during congressional oversight of the administrative system. He has retired, but has not stopped working. In an investigation he conducted as a special counsel to the Administrative Conference of the United States (ACUS), a copy of which is attached to my testimony, he found that among the more than 1,000 significant final rules issued from 2012 to mid-2014, agencies appeared to have made omitted the required submissions in fewer than 50 instances. Significantly, soon after that study was published, Mr. Copeland found that even this number was too high as agencies contacted him with evidence that others have their rules had in fact been submitted properly but were not properly recorded in the GAO's database or the Congressional Record. The vast majority of these could not reasonably be deemed controversial enough to attract CRA treatment.

This high rate of compliance is especially noteworthy given the obstacles agencies face under the CRA. One major challenge is that the CRA employs an extremely broad definition of "rule," which includes non-substantive measures as Coast Guard rules establishing "safety zones" for fireworks displays and routine actions such as the Federal Aviation Administration's airworthiness directives. Agencies cannot make their CRA-mandated submissions electronically. Remarkably, in this day and age, submissions must be made through the expensive and time-consuming process of hand delivery by courier.

Thank you again for the opportunity to testify today. I'd be pleased to answer any questions you may have.

Attachment—Copeland CRA Study